COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department on its own Motion into the Appropriate Regulatory Plan to succeed Price Cap Regulation for Verizon New England Inc. d/b/a Verizon Massachusetts' intrastate retail telecommunications services in the Commonwealth of Massachusetts	)	D.T.E. 01-31

MOTION FOR CONFIDENTIAL TREATMENT

Verizon Massachusetts ("Verizon MA") requests that the Department, in accordance with Mass. General Laws c. 25, § 5D and the Department's Ground Rules in this proceeding, grant this Motion to provide confidential treatment of certain data that Verizon MA provided in response to Information Requests NEPCC-VZ 3-1, AG-VZ 4-6 and AG-VZ 4-3, filed on October 10, 12 and 16, 2001, respectively. As shown below, the data qualify as "trade secret" or "confidential, competitively sensitive, proprietary" information under Massachusetts and federal law and are entitled to protection from public disclosure in this proceeding.

ARGUMENT

In determining whether certain information qualifies as a "trade secret,"[1] Massachusetts courts have considered the following:

> (1) the extent to which the information is known outside of the business;

[1] Under Massachusetts law, a trade secret is "anything tangible or electronically kept or stored which constitutes, represents, evidences or records a secret scientific, technical, merchandising, production or management information design, process, procedure, formula, invention or improvement." Mass. General Laws c. 266, § 30(4); *see also* Mass. General Laws c. 4, § 7. The Massachusetts Supreme Judicial Court, quoting from the Restatement of Torts, § 757, has further stated that "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors.... It may be a formula treating or preserving material, a pattern for a machine or other device, or a list of customers." *J.T. Healy and Son, Inc. v. James Murphy and Son, Inc*., 260 N.E.2d 723, 729 (1970). Massachusetts courts have frequently indicated that "a trade secret need not be a patentable invention." *Jet Spray Cooler, Inc. v. Crampton*, 385 N.E.2d 1349, 1355 (1979).

> (2) the extent to which it is known by employees and others involved in the business;
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> (3) the extent of measures taken by the employer to guard the secrecy of the information;
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> (4) the value of the information to the employer and its competitors;
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> (5) the amount of effort or money expended by the employer in developing the information; and
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> (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Jet Spray Cooler, Inc. v. Crampton, 282 N.E.2d 921, 925 (1972).

The protection afforded to trade secrets is widely recognized under both federal and state law. In *Board of Trade of Chicago v. Christie Grain & Stock Co.*, 198 U.S. 236, 250 (1905), the U.S. Supreme Court stated that the board has "the right to keep the work which it had done, or paid for doing, to itself." Similarly, courts in other jurisdictions have found that "[a] trade secret which is used in one's business, and which gives one an opportunity to obtain an advantage over competitors who do not know or use it, is private property which could be rendered valueless ... to its owner if disclosure of the information to the public and to one's competitors were compelled." *Mountain States Telephone and Telegraph Company v. Department of Public Service Regulation*, 634 P.2d 181, 184 (1981).[2]

[2] *See also, e.g., Investigation into Appropriate Regulatory Plan for Verizon,* DTE 01-31, Hearing Officer Ruling (September 14, 2001) at 8 ("I determine that Verizon has neither violated 47 U.S.C. § 222(b), nor has Verizon been unreasonable in its refusal to disclose to parties in this proceeding third-party specific information in Verizon's province, without authorization from the third-parties involved. This has been the prior practice in this proceeding and in other Department proceedings.") and Hearing Officer Ruling (August 29, 2001) at 3 ("I agree with VZ–MA that its response to AG-VZ-1-8 involves third-party specific data which could jeopardize the competitive position of a service provider who is not a party to this proceeding. Unless RCN waives protection and grants VZ–MA permission to publicly disclose this information, I grant VZ–MA's Motion to treat the materials submitted attached to AG-VZ-1-8 as confidential, proprietary materials."); *Bell Atlantic's Tariffs Nos. 14 and 17*, DTE 98-51, Hearing Officer Ruling (November 5, 1999) at 5 (ruling that "the number of plain old telephone service (POTS) lines each carrier has in each central office should avoid public scrutiny."); *Bell Atlantic's Local Service Provider Freeze*, DTE 99-105, Hearing Officer Ruling (April 20, 2000) (protecting carrier data regarding ordering volumes); *Bell Atlantic's Local Service Provider Freeze*, DTE 99-105, Hearing Officer Ruling (April 20,

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), *codified at* 47 U.S.C. §§ 151 et seq., provides further protection for the confidential and proprietary information of telecommunications customers and carriers. *See* 47 U.S.C. § 222. Among other things, § 222 protects both customer proprietary network information and the confidentiality of proprietary carrier data.[3]

The attachment to Verizon MA's response to Information Request NEPCC-VZ 3-1 provides a further disaggregation of the number of resold public access lines ("PALs") and public access smart lines ("PASLs") by exchange or wire center, if available, earlier provided in response to NEPCC-VZ 2-6.[4] The attachment identifies the number of PAL and PASL lines that Verizon MA provides to resellers in each exchange. The data represent valuable service-specific commercial information that competitors could find useful in establishing sales strategies that

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2000) (protecting carrier documents relating to (i) internal procedures implementing, removing or responding to local service provider freeze and (ii) information containing customer service and marketing information regarding success or failure at overcoming service provider freezes).

[3] Section 222(f)(1) defines "customer proprietary network information" in relevant part as:

> (A) information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and
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> (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier.

In addition, §§ 222(a) and (b) provide:

> (a) IN GENERAL.—Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier.
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> (b) CONFIDENTIALITY OF CARRIER INFORMATION.—A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts.

[4] On September 20, 2001, Verizon MA filed a Motion for Protective Treatment of, among other things, its response to NEPCC-VZ 2-6.

target particular market segments. Similar Verizon MA resale information has been found to be subject to protective treatment in this docket.[5]

Data responsive to this request has been provided to the Department and to those parties that have executed a mutually acceptable protective agreement. In addition, in light of the Department's Interlocutory Order of August 29, 2001, the wire center names have been removed and the data listed in random order on the non-proprietary version of the attachment.

Verizon MA's response to Information Request AG-VZ 4-6 provides the number of Massachusetts access lines served by AOL, Time Warner, McLeod USA, Allegiance Telecom and XO Communications. The access line numbers are the confidential and proprietary information of the competitive providers that Verizon MA may not disclose without the providers' authorization. In addition, the response identifies the total access line growth for each carrier between 1999 and 2000. In light of the Hearing Officer's discovery ruling of September 14, 2001, the information is being provided to the Department and to those parties that have executed mutually acceptable protective agreements. The access line numbers should not be disclosed publicly for reasons set forth in Hearing Officer rulings in other instances in this proceeding.[6]

The attachment to Information Request AG-VZ 4-3 identifies a particular carrier and includes copies of all work and systems notes associated with Verizon MA's provision of service to that carrier. Specifically, the documents set forth Verizon MA's engineering design relating to the carrier's particular request for service. Among other things, the documents identify with specificity the relevant circuits, locations, telephone numbers, and other carrier- and end user-specific data. The documents also reflect Verizon MA's engineering practices in provisioning

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5 *See, e.g.,* Interlocutory Order dated August 29, 2001 at 9-10 protecting exchange-specific resale data); Hearing Officer Ruling dated August 29, 2001 at 4 (protecting resale data by class of service and exchange-specific data).

6 *See, e.g.,* Hearing Officer Ruling dated September 14, 2001 at 8.

the relevant services. Accordingly, the information is being provided only to the Department and to those parties to whom the customer of record authorizes disclosure, subject to protective treatment. As the Attorney General's witness represented in testimony to know the identity of the relevant carrier, no hardship arises in the Attorney General's seeking such authorization.[7] As noted above, the pertinent data are the confidential and proprietary information of Verizon MA and the specific carrier and should not be disclosed publicly for reasons set forth in Hearing Officer rulings in other instances in this proceeding.

The information for which Verizon MA is requesting protective treatment is compiled from internal databases that are not publicly available, is not shared with any non-Verizon employees for their personal use, and is not considered public information. Any dissemination of this information to non-Verizon employees, such as contracted service providers, is labeled as proprietary. Further, any non-Verizon employees who are working for Verizon and may have access to this information are under a non-disclosure obligation.

Verizon MA employees that have access to the relevant data are similarly subject to non-disclosure requirements. For example, employees who use this information during the course of their responsibilities are not permitted to publish the relevant data for general public use or release them for publication by others to the general public. Moreover, when these data are transferred internally they are transferred over a protected network and are marked proprietary. As explained below, public disclosure of the requested information could create a competitive disadvantage for Verizon MA and the relevant carriers, and be of value to other providers in developing competing market strategies.

The requested data represent valuable commercial information that competitors could use to frustrate Verizon MA and competitor efforts in the competitive market. For example,

[7] In fact, Verizon MA understands that the Attorney General has already sought such authorization.

underscoring the confidential and competitively sensitive nature of the data, Verizon MA sales and marketing personnel are not provided access to the third-party information contained in the relevant responses for the purpose of competing against other providers. The data could be useful to Verizon MA retail representatives (and other competitors that seek to scrutinize Verizon MA's like proprietary information) by allowing them to know *which* services or exchanges warrant greater sales and marketing resources and, correspondingly, which may not. Disclosure of such information inappropriately tips the competitive balance by permitting competitors to target Verizon MA (and other competitors') customers to gain a competitive advantage in the marketplace that they otherwise would not enjoy. In balancing the public's "right to know" against the public interest in an effectively functioning competitive marketplace, the Department should continue to protect information that, if made public, would likely create a competitive disadvantage for the party complying with legitimate discovery requests.

In short, the information is not readily available to competitors and would be of value to them in developing competitive marketing strategies. Competitive disadvantage is likely to occur if the confidential information is made public – solely as a result of regulatory oversight.[8] The benefits of nondisclosure, and associated evidence of harm to Verizon MA (and the relevant carriers), outweigh the benefit of public disclosure in this instance. By releasing this information to the public, competitive companies will be able to determine characteristics of Verizon MA's and the carriers' market segments and will have the ability to utilize this information in developing particular offerings in direct competition with Verizon MA and the carriers. Historically, both the Department and the telecommunications industry have recognized such information to be confidential and appropriately subject to protection by order and the execution of reasonable nondisclosure agreements. Nothing has changed in terms of law or circumstance

[8] If Verizon MA were not a regulated entity, the relevant information would not be available for public inspection.

that warrants an abandonment of that protection. Given the increasingly competitive telecommunications world, the Department should not now depart from its past practice and apply G.L. c. 25, §5D to permit competitors to gain access to what is private, commercial information. Disclosure of the competitively sensitive material will undermine Verizon MA's ability to compete with other providers of like services that are not subject to equal public scrutiny.

CONCLUSION

WHEREFORE, Verizon MA respectfully requests that the Department grant this Motion to afford confidential treatment to all data contained in the proprietary portions of its responses to Information Requests NEPCC-VZ 3-1, AG-VZ 4-6 and AG-VZ 4-3. As demonstrated above, the information is entitled to such protection, and no compelling need exists for public disclosure in this proceeding.

Respectfully submitted,

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